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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 264

HOMER M. PRESTON,
Respondent,

vs.

AETNA LIFE INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Scheffer Printing Company, FInancial 6-2694

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioner, Aetna Life Insurance Company, respectfully prays that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court (a) reversing a judgment of the District Court entered for petitioner on its motion for a summary judgment and (b) remanding the cause to the District Court for trial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28 of the U. S. Code, and Rule 38 of the Rules of the Supreme Court, for the reason that the Court of Appeals has decided an important question of state law

in a manner contrary to the decisions of the highest court of Illinois and contrary to the overwhelming weight of authority in the Illinois intermediate appellate courts.

The judgment of the Court of Appeals was entered April 14, 1949 (R. 118). Rehearing was prayed, and denied on May 16, 1949 (R. 159).

Opinions Below.

The opinion of the Court of Appeals appears in the record at page 109 and is reported in 174 F. (2d) 10. The opinion of the District Court appears in the record at page 86 and is reported in 77 F. Supp. 743.

Summary Statement of the Matter Involved.

Respondent sought recovery under an accident insurance policy issued by petitioner for the amputation of his right leg immediately below the knee. The policy provided indemnity against a loss

> "resulting *directly and independently of all other causes* from bodily injuries sustained during the term of this policy *and effected solely through accidental means*". (R. 3, emphasis supplied).

The policy also contained a clause excluding recovery for injuries or other loss

> "caused *directly, wholly or partly,* . . . (2) by disease in any form". (R. 10, emphasis supplied).

Petitioner denied that the loss sustained by respondent was the result directly and independently of all other causes from bodily injuries within the insuring clause, and asserted that the loss was caused directly, wholly or partly by disease within the terms of the exclusion clause. (R. 25-26).

No facts in this case are in dispute. The parties stipulated that the statements of respondent, attending physicians and hospital records were true and correct and might be received in evidence at the trial of the case. (R. 33). The stipulated facts showed that for some period of time prior to October, 1944 plaintiff had been suffering from either arteriosclerosis or Buerger's Disease, a peripheral vascular disease in the right foot and leg, and a recognized disease in the medical concept of that word. On the date in question while seated at his desk, respondent removed the shoe of his right foot to relieve its soreness. In raising his right foot to his desk, he struck the base of the great toe on the corner of his desk, bruising the toe. The bruise did not heal because of the pre-existing disease of the circulatory system of the leg. An ulcer developed, gangrene followed, and it became necessary to amputate the leg just below the knee.

Based on the undisputed facts, petitioner filed its motion for summary judgment, contending that under the terms of the contract of insurance and the law of Illinois there could be no recovery. The motion for summary judgment was supported by a medical affidavit stating that the stipulated facts showed the pre-existing disease contributed to the loss.

Respondent filed two medical affidavits in opposition to the petitioner's motion for summary judgment. These affidavits in no way contradicted either the stipulated facts or petitioner's medical affidavit, but added that at the time of the injury the pre-existing disease was dormant and was caused to become active by the injury. The trial court accepted this statement of respondent's medical affidavits and after carefully reviewing the Illinois law (R. 86) held that under such facts there could be no recovery. Summary judgment was thereupon entered for petitioner.

The Court of Appeals by inference criticized the summary judgment procedure, though later stating that if the Illinois law was as contended by petitioner, and as found by the trial court, the summary judgment procedure was proper. The Court of Appeals, however, refused to accept the trial court's determination as to the Illinois law and reversed the judgment, holding as contended by respondent, that recovery could be had if the injury was the "proximate cause" of the loss even though the loss was contributed to by the disease. This ruling has the effect of reading this doctrine into contracts of insurance such as here involved even though it is contrary to the express terms of the contracts. The Court of Appeals remanded the case for trial to determine the "proximate cause".

Questions Presented.

1. *Under Illinois law can there be recovery on an accident policy containing the above limitation if a pre-existing disease contributes to the loss?* Under Illinois law applied to the contract provision here involved it is immaterial whether a pre-existing disease or an accidental injury is the "proximate cause" of the loss so long as the two causes have combined to produce the loss. To hold otherwise would allow the courts to rewrite insurance contracts, a procedure which both this Court and the Supreme Court of Illinois have repeatedly stated will not be permitted.

2. *May federal courts disregard holdings of state courts of last resort?* Under the *Erie* doctrine a federal court in determining local law must consider as binding upon it all decisions of the highest state court whether such decisions are by express holdings or by necessary implication.

3. *In the absence of holdings by a state court of last resort may federal courts disregard the compelling weight of authority among the various intermediate appellate courts of the state and create a "conflict" based on one adverse decision of the intermediate appellate courts as the basis of substituting its own judgment as the state law?* In determining an intermediate appellate court's judgment as a datum for ascertaining state law, federal courts must consider the weight of authority among the various intermediate appellate courts of the state, whether possible conflicting decisions by those intermediate appellate courts are actual holdings or mere *dictum,* are based on prior *dictum* or on more controlling authority, and whether those that are holdings discuss and distinguish or reject prior conflicting decisions.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The Court of Appeals completely disregarded the only decision of the Illinois Supreme Court on this question, *Ebbert* v. *Metropolitan Life Insurance Co.,* 369 Ill. 306, in which it was held that there could be no recovery on an insurance policy of the kind involved in the instant case if the insured had a pre-existing disease that contributed to the loss. The decision of the Court of Appeals is thus in direct conflict with the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

If, under the *Erie* rule, federal courts in some instances are not required to accept as determinative of state law a decision of the highest state appellate court, the Court of Appeals' decision presents an important question of federal law which has not, but which should be settled by this Court.

2. The Court of Appeals did not follow the decisions of the Illinois intermediate appellate courts but held that one decision of one of the four Illinois appellate district courts, was sufficient to create a "conflict" among the intermediate appellate court districts and allow the Court of Appeals to substitute its own judgment as the law of Illinois. It did so although the case so relied upon (a) did not cite any other Illinois case touching on the point under consideration, (b) did not discuss or comment on other Illinois cases holding to the contrary, and (c) neither distinguished nor refused to follow former contrary decisions of the same court.

The procedure so taken by the Court of Appeals is in direct conflict with the decision of this Court in *Six Companies of California, et al.* v. *Joint Highway District No. 13 of California,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 and *West, et al.* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

3. The effect of the decision is to completely eliminate from insurance contracts the insurance provisions and the exclusion clause as above set forth and to substitute therefor "proximate cause". To do this is to deny the language of the contract of insurance its plain, ordinary and popular meaning which this Court said cannot be done (*Bergholm et al.* v. *Peoria Life Ins. Co. of Peoria, Ill.,* 284 U. S. 489, 492; 52 S. Ct. 230; 76 L. Ed. 416, *Williams* v. *Union Central Life Ins. Co.,* 291 U. S. 170, 180; 54 S. Ct. 348; 78 L. Ed. 711), and to rewrite the contract of insurance which the Court of Appeals for the Seventh Circuit in *Hooker* v. *New York Life Ins. Co.,* 161 F. (2d) 852, 856, in construing Illinois law said cannot be done, and which the Illinois Supreme Court in *Zitnik* v. *Burik,* 395 Ill. 182, 186, said cannot be done. The decision of the Court of

Appeals is thus again in direct conflict with the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Wherefore it is respectfully urged that this petition for writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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AETNA LIFE INSURANCE COMPANY,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts are stated in the accompanying petition for a writ of certiorari.

Jurisdiction.

The jurisdiction of this Court is shown in the accompanying petition.

Opinions Below.

The opinion of the Court of Appeals appears in the record at page 109. It is reported in 174 F. (2d) 10. The opinion of the District Court appears in the record at page 86. It is reported in 77 F. Supp. 743.

Specification of Errors.

If a writ of certiorari is issued, petitioner intends to urge that the Court of Appeals for the Seventh Circuit erred:

1. In holding that under the law of Illinois the doctrine of "proximate cause" will be read into a contract of insurance when not contained in the terms of the contract;

2. In refusing to follow the holdings of the highest appellate court of Illinois which, under the *Erie* doctrine, is binding on federal as well as state courts in applying state law;

3. In substituting its own judgment for the law of Illinois and basing its judgment on one of its own decisions rendered before the decision of this Court in the *Erie* case.

ARGUMENT.

I.

The Decision of the Court of Appeals That Under Illinois Law the Doctrine of "Proximate Cause" Will Be Read Into a Contract of Insurance Is in Direct Conflict with the Holding of the Supreme Court of Illinois in the Ebbert Case.

A.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 requires federal courts in interpreting state law to accept as binding the substantive law of the state as expressed by the highest appellate court, in this instance, the Illinois Supreme Court. The Court of Appeals' decision, while paying lip service to the *Eire* doctrine, states that the Illinois Supreme Court has not passed on this question though petitioner indicated to the Court of Appeals in its original brief, in oral argument before the Court, and in its petition for rehearing (R. 128) that the question had been determined by the Illinois Supreme Court and was no longer open for consideration.

In *Ebbert* v. *Metropolitan Life Ins. Co.,* 289 Ill. App. 342 (1st Dist. 1937) an action was brought on an insurance policy which provided for double indemnity if the insured's death resulted from "accidental means" independently of all other causes and was not contributed to by disease. The insured died as the result of (1) degenerative changes of the heart muscle and (2) surgical shock and anesthesia. Trial was held before the court without a jury resulting in judgment for plaintiff from which defendant appealed.

The Appellate Court reversed the judgment for plaintiff and entered judgment for defendant without remanding on the grounds that 1) the "means" thru which plaintiff lost his life, the anesthesia, was not accidental, and 2) "the insured was suffering from disease which directly contributed to his death" (p. 358).

On Appeal to the Supreme Court of Illinois (*Ebbert* v. *Metropolitan Life Ins. Co.*, 369 Ill. 306 (1938)) plaintiff challenged the right of the Appellate Court to enter findings of fact and reverse without remanding, inasmuch as plaintiff had introduced evidence at the trial tending to establish a cause of action. The Supreme Court upheld the right of the Appellate Court to reverse without remanding and affirmed the judgment. Although the opinion of the Appellate Court had dealt almost entirely with the first ground of that Court's decision, the definition of "accidental means", the Supreme Court after reviewing the evidence in detail ignored this ground and based its decision entirely on the second ground, that the insured's death was contributed to by disease or bodily infirmity. By so doing the Supreme Court indicated beyond question that in its opinion the important ground for denying recovery was the presence of the pre-existing disease that contributed to the plaintiff's loss.

It seems inconceivable that the Supreme Court of Illinois would have based its decision solely on the fact that the pre-existing disease contributed to the loss and deliberately ignored the alternative grounds on which the Appellate Court had primarily based its decision, that of "accidental means", the Supreme Court after reviewing sider the *Crandall* rule, (*Crandall* v. *Continental Casualty Co.*, 179 Ill. App. 330 (1913)) contended for by petitioner and accepted by the trial court herein, as the correct statement of Illinois law. The Court's long discussion

of the procedural point under the Civil Practice Act would have been wholly pointless if the Court did not accept as substantive law the *Crandall* rule.

If the findings of fact as entered by the Appellate Court did not as a *matter of law* prove the issue before that Court, that is, that plaintiff could not recover if a pre-existing disease contributed to the loss, such findings of fact would be meaningless and the Supreme Court in carrying out its reviewing function would have been required to so indicate. By its holding the Supreme Court must of necessity have passed on the law of the case to which the facts were applicable even though the Supreme Court did not restate the rule of law involved. The same would be true if the opinion of the Supreme Court had been simply "Per Curiam judgment affirmed". The rule of law stands that contribution by the pre-existing disease is sufficient to defeat recovery whether it be considered the "proximate cause" of the loss or not.

Both the Appellate Court and Supreme Court decisions in the *Ebbert* case were fully discussed in petitioner's brief in oral argument, and in the petition for rehearing (R. 128). Despite this the Court of Appeals refers only to the Appellate Court decision, and this only very briefly, with no reference whatsoever being made to the Supreme Court decision. We believe that to so completely disregard a ruling of the Supreme Court of Illinois on such an important question of local law amounts to an abuse of the *Erie* doctrine sufficiently grave to call for the exercise of this Court's supervisory powers.

B.

The most that can be said against petitioner's position is that the Illinois Supreme Court in the *Ebbert* case did not *expressly* sustain the *Crandall* rule but only *impliedly*

sustained it. Nevertheless, its sustaining of the *Crandall* rule was by necessary implication on facts of the case presented for decision and on points of law raised on the record necessary to the determination of the case. As such it meets the Illinois requirements for a decision. (*Ward* v. *Caverly*, 276 Ill. 416 (1916), *Palmer House Co.* v. *Industrial Commission*, 388 Ill. 542, 547 (1944)). As a decision, under the *Erie* doctrine it is binding on the Court of Appeals.

In *Yoder, et al.* v. *Nu-Enamel Corp.*, 117 F. (2d) 488 (1941) the Court of Appeals for the Eighth Circuit said (page 489):

> "The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having clear root in judicial conscience and responsibility, whether resting on direct, express or *obvious implication and inference*, should accordingly be given appropriate heed." (Emphasis supplied.)

If the above is not true, then the Court of Appeals in the instant case is in conflict with the Eighth Circuit and has decided an important question of federal law which has not been, but which should be settled by this Court.

II.

The Decision of the Court of Appeals That the Doctrine of "Proximate Cause" Will Be Read into a Contract of Insurance Such As Here Involved, and the Insuring Clause and Exclusion Clause Stricken, Is Erroneous Because It Is in Direct Conflict with Decisions of this Court, of the Court of Appeals in Interpreting Illinois Law and of the Supreme Court of Illinois.

The effect of the decision of the Court of Appeals is to strike from an insurance contract of this nature (a) the

provisions of the insuring clause limiting recovery to losses caused "directly and independently of all other causes from bodily injuries . . . and effected solely through accidental means" and (b) the provisions of the exclusion clause prohibiting recovery for losses "caused directly or indirectly, wholly or partly . . . by disease in any form", and to substitute therefor "proximate cause". To do so is to deny the contract of insurance its plain, ordinary and popular meaning in contravention of decisions of this Court (*Bergholm, et al.* v. *Peoria Life Ins. Co. of Peoria, Ill.*, 284 U. S. 489, 492; 52 S. Ct. 230; 76 L. Ed. 416; *Williams* v. *Union Central Life Ins. Co.*, 291 U. S. 170, 180; 54 S. Ct. 348; 78 L. Ed. 711) and to rewrite the contract of insurance, which the Court of Appeals for the Seventh Circuit in *Hooker* v. *New York Life Ins. Co.*, 161 F. (2d) 852, 856 in construing Illinois law said cannot be done, and which the Illinois Supreme Court in *Zitnik* v. *Burik*, 395 Ill. 182, 186 said cannot be done. To this extent the decision is again in direct conflict with the *Erie* doctrine. This point was also urged on the Court of Appeals by petitioner in its original brief, in oral argument, and in its petition for rehearing (R. 140), but no mention whatsoever is made of this point in the Court of Appeals' opinion.

III.

Had the Illinois Supreme Court Not Decided the Question in the Ebbert Case, the Decision Is Erroneous in Not Applying the Considered Judgment of the State Intermediate Appellate Courts.

The Court of Appeals' decision also pays lip service to, but fails to abide by, the words of this Court, in *Six Companies of California, et al.* v. *Joint Highway District No. 13 of California*, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed.

114, and *West, et al.* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 holding that, in the absence of a decision by the highest state appellate court, federal courts are bound by the decisions of state intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise. Assuming that the Illinois Supreme Court had not passed on the question at issue, almost without exception every decision of each of the four Illinois Appellate Court Districts has followed the *Crandall* rule, contended for by petitioner, denying recovery where a pre-existing disease contributes to the loss. *Rebenstorf* v. *Metropolitan Life Ins. Co.*, 299 Ill. App. 71, 85 (1st Dist. 1939) is the case that interjected the theory of "proximate cause" which it took bodily from the *dictum* of the Court of Appeals for the Seventh Circuit in *Scanlan* v. *Metropolitan Life Ins. Co.*, 93 F. (2d) 942 (1937), a case decided as general law prior to the *Erie* doctrine, which therefore did not purport to reflect the Illinois law.

The District Judge in his opinion (R. 88 *et seq.*) so clearly analyzes the Illinois cases on this point that we will not repeat a detailed analysis here. Suffice it to say that the *Rebenstorf* decision is solely based on the *dictum* of the *Scanlan* case and cites as authority three Illinois cases none of which is at all in point nor does it discuss, comment on, or distinguish other Illinois cases holding to the contrary. It is this decision which the Court of Appeals says creates a "conflict" between the First and Second District, not mentioning decisions of the other two districts supporting the *Crandall* rule. We believe it is clear that the Court of Appeals in so deciding failed to give due consideration to the weight of authority among the decisions of all four Appellate Districts of the state.

The following are Illinois Appellate Court decisions which support the *Crandall* rule:

First District.

Ebbert v. *Metropolitan Life Ins. Co.*, 289 Ill. App. 342 (1937).

Wayne v. *Travelers Ins. Co.*, 220 Ill. App. 493 (1921).

Robison v. *United States Health and Accident Ins. Co.*, (Abstract decision) 192 Ill. App. 475 (1915).

Martin v. *Illinois Commercial Men's Association*, 195 Ill. App. 421 (1915).

Second District.

Welte v. *Metropolitan Life Ins. Co.*, 305 Ill. App. 120 (1940).

Strehlow v. *Aetna Life Ins. Co.*, 183 Ill. App. 50 (1913), Cert. den. 186 Ill. App. xxxiii.

Crandall v. *Continental Casualty Co.*, 179 Ill. App. 330 (1913).

Third District.

Schroeder v. *Police & Firemen's Ins. Co.*, 300 Ill. App. 375 (1939).

Fourth District.

Klinke v. *Great Northern Life Ins. Co.*, 318 Ill. App. 43 (1943).

Although as noted by the Court of Appeals the *Rebenstorf* decision is the last decision of the First District, still the earlier cases of that Court should not be ignored, especially since the *Rebenstorf* case is not supported by any case it relies on and does not discuss these former decisions, as is clearly shown in the trial court's opinion (R. 88 *et seq.*) to which we again invite this Court's atten-

tion. Since the Court of Appeals did not analyze the decisions of the intermediate appellate courts of Illinois, it did not apply the principle set forth by this Court in the *Six Companies* and *West* cases as above noted.

The record does not disclose any "persuasive authority" that would indicate that the Illinois Supreme Court would rule contrary to the great majority and the unquestionably better-reasoned Illinois decisions except a statement in the Court of Appeals' decision, not supported by any citation of cases, that the Court believes that the weight of authority thruout the country supports the *Rebenstorf* case. Because of this statement, petitioner in its petition for rehearing (R. 139) cited cases from nearly every important jurisdiction showing that the overwhelming weight of authority thruout the country does not support the *Rebenstorf* rule and does support the *Crandall* rule. In fact the two cases from other jurisdictions most strongly relied on by respondent were shown to have been subsequently reversed in favor of the *Crandall* rule.

CONCLUSION.

It is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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